In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 460

WILLIAM L. PALMER, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 340 F. 2d 48.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1964. A petition for rehearing was denied on June 23, 1965. On July 19, 1965, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including August 20, 1965. The petition for a writ of certiorari was filed on August 16, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

787-159—65

QUESTIONS PRESENTED

1. Whether petitioner was adequately represented by appointed counsel.

2. Whether petitioner was entitled to a new trial because two jurors admitted having seen newspaper headlines concerning reports of the trial while it was in progress.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of Texas, petitioner was convicted on four counts of an indictment charging the unlawful sale of drugs in violation of 21 U.S.C. 353 (Tr. 611).[1] He was sentenced to imprisonment for one year on each of the first three counts, to be served consecutively, and to a suspended term of imprisonment for two years on the fourth count (Tr. 734). The court of appeals affirmed.

1. The government's evidence may be summarized as follows:

An informer, working with the Houston, Texas office of the Food and Drug Administration, arranged to purchase without prescription from petitioner's son approximately 50,000 amphetamine tablets (referred to frequently as "bennie pills" by the witnesses) (Tr. 59–63). An intervening automobile accident involving petitioner's son prevented the planned delivery of the tablets to the informer (Tr. 64–65). The informer then contacted petitioner, whose wholesale drug warehouse was the source of the amphetamine tablets, and asked him to follow through on the transaction (Tr.

[1] Reference is to the consecutively paginated volumes of the transcript of trial.

66–67, 159–160). Petitioner agreed to do so, arranged a meeting with the informer, and delivered approximately 38,000 amphetamine tablets to him on March 12, 1963 (Tr. 68–71). The following day petitioner delivered the remaining 12,000 tablets to the informer at the warehouse (Tr. 71–77). Representing himself as the largest dealer in the area in such drugs, petitioner solicited further business from the informer and arranged to sell him 50,000 more amphetamine tablets (Tr. 73–77). Later the same day, petitioner's son delivered 50,000 tablets to the informer, who in turn met with petitioner that evening and paid for the tablets (Tr. 75–81). All of these meetings and transactions were observed from a distance by agents of the Food and Drug Administration (Tr. 72, 163–166, 168–173, 177–181, 202–211, 219–222, 262–268, 529–531, 537–541).

2. After the trial, but prior to sentencing, counsel for petitioner requested a new trial asserting that the jurors had read newspaper stories regarding the trial while it was in progress (Tr. 619–624). The district court, after a hearing, determined that the allegations of misconduct were without substance (Tr. 623–721). Testimony of the twelve jurors[2] who served on the case established that although some newspapers had been present in the jury room during the trial of the case, they had all been removed prior to submission of the case to the jury for deliberation (Tr. 626–627, 640–641, 645–646, 654, 657–658, 662–666, 668–670, 673,

[2] The testimony of one alternate juror was not available, but it was agreed that his testimony would not have supported the allegations of the motion (Tr. 620–621, 695–697).

678, 682, 686, 692, 697–698). Two of the jurors testified that they saw a headline on an article about the trial, but the headline merely stated that petitioner was on trial, and neither juror read any part of the article (Tr. 646–650, 686–687). None of the other jurors saw or read anything at all about the trial while it was in progress (Tr. 640–641, 654, 658, 666, 668–671, 673, 675, 678, 682–683, 692). There was no discussion among the jurors regarding any newspaper articles about the trial (Tr. 649, 667, 679, 693).

ARGUMENT

1. Petitioner's allegation, now made for the first time,[3] that he was inadequately defended at his trial, is completely without substance and is wholly unsupported by the record. Petitioner bases this allegation on isolated remarks made by his appointed counsel during trial and quoted out of context (Pet. 4–5). Defense counsel's remarks appear to have been directed toward minimizing the impact of the evidence provided by numerous government witnesses and toward evoking sympathy for his client. By saying, "if he [the assistant United States attorney] proves everything he says he is going to prove, all you can do is convict" (Tr. 56), defense counsel was laying the foundation for the defense of the case—*i.e.*, that the

[3] The same senior counsel of a Texas firm who, assisted by an associate, represented petitioner at trial, also represented him during the hearing on the motion for new trial, at which time a third lawyer entered the case on behalf of petitioner (Tr. 26, 38, 619–624). The third attorney represented petitioner in the court of appeals, but subsequently withdrew because of illness (see 340 F. 2d at 49; petitioner's motion for extension of time, filed with this Court, pp. 1–2).

government could not prove its allegations—and was not asking the jury to convict petitioner, as petitioner now asserts (Pet. 6).

The record belies petitioner's assertions of inadequacy on the part of his defense counsel. It reflects that defense counsel cross-examined government witnesses vigorously (Tr. 81–150, 188–196, 200, 212–216, 223–231, 237–261, 269–273, 285, 304–305, 309), and conducted a searching cross-examination of the government's medical expert (Tr. 237–261). The record also shows that defense counsel called numerous defense witnesses to establish petitioner's theory of defense (Tr. 311–344, 381–390, 393–395, 398–415, 435–438, 443–483). It is clear from the questioning of witnesses by defense counsel and from his closing argument on the case that he fully understood the application of the pertinent law to the facts of the case. Petitioner claims that his counsel did not request additional instructions to the jury (Pet. 5), but he fails to specify any error or inadequacy in the charge.

2. The district court did not abuse its discretion in refusing to grant petitioner a new trial on grounds of alleged jury misconduct. Petitioner failed to show that any juror had been influenced in any way by the mere presence of some newspapers in the jury room prior to deliberation. There was no evidence that any juror had read newspaper stories concerning the trial; only two jurors saw an innocuous headline. There was no discussion among the jurors of any newspaper articles or any prejudicial information contained in such articles. The district court specifically instructed the jurors, prior to deliberation, not to watch tele-

vision or read newspapers concerning the case (Tr. 552), and not to discuss the case until time for their deliberation (Tr. 57–58, 331–332, 552).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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UNITED STATES OF AMERICA, *Respondent*

REPLY TO BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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A.

The Defense

Because a court-appointed lawyer felt that he was free to defend his captive client without performing the pre-trial preparation required in all contested litigation, this case imposes a special responsibility upon this Court to establish some minimum standards for the performance of

lawyers whose presence at the side of the accused is essential to preserve the very jurisdiction of the trial court. *Johnson v. Zerbst*, 304 U.S. 458; *Gideon v. Wainwright*, 372 U.S. 335.

To determine whether minimum standards of diligence were met by appointed counsel in this case, we do not believe it is necessary, or even desirable, for the Court to immerse itself in the "infinite variety" of moment-to-moment trial decisions which "are not justiciable issues." *Mitchell v. United States*, 259 F.2d 787, 792.

Nevertheless, since the Brief in Opposition suggests that counsel did what might be expected of him, we feel that the Court should consider the following:

1. It is true that the defense did call witnesses. The first of these witnesses was petitioner's son, who was under subpoena as a government witness (R. 393) and whose crucial testimony "on behalf of the Government" was so important as to cause Petitioner's retained attorney to withdraw from Petitioner's case (R. 22).

2. Another "defense witness" was a federal food and drug investigator, apparently called in part to establish that the government informer and star witness was "acting as a public, civic-minded citizen throughout this whole transaction" (R. 388).

3. The only other "defense witness" (other than Petitioner himself and the informer, who was recalled by the defense; R. 403) was Petitioner's original lawyer, about whom counsel said in the presence of the jury, "I want to show whatever bias or prejudice he has against my client" (R. 400).

To call or not to call witnesses, to cross-examine or not to cross-examine witnesses, to make any of the other decisions which arise during the course of a criminal trial, depends on preparation which was admittedly absent in this case (R. 56-57, 229, 564). The ostensible exercise of rights available to a defendant is no substitute for the plain hard work which must precede intelligent judgment. As the Ninth Circuit said in *Brubaker v. Dickson*, 310 F.2d 30, 39 (1962):

> "Appellant does not complain that after investigation and research trial counsel made decisions of tactics and strategy injurious to appellant's cause; the allegation is rather that trial counsel failed to prepare, and that appellant's defense was withheld not through deliberate though faulty judgment, but in default of knowledge that reasonable inquiry would have produced, and hence in default of any judgment at all."

As in *Johnson v. United States* (5 Cir., 1964, 328 F.2d 605, 606), "we have the unusual situation of trial counsel himself (not the counsel here on appeal) making this charge against himself" through admissions during trial. When an appointed lawyer concedes in open court that he has investigated neither the facts (R. 56-57, 564) nor the law R. 229), his certificate of neglect should compel a new trial.

We cannot believe that in establishing a national constitutional policy this Court is prepared to declare that a lawyer may satisfy his obligation to the public without at least some regard for the preparation which all lawyers and courts know is necessary. Indeed, Mr. Palmer had a right to expect "a devotion to the interest of the accused that was at least equal to that expected from compensated

counsel of an accused's own choosing," *Johnson v. United States*, supra, 5 Cir., 1964, 328 F.2d 605, 606. In *Gideon* itself, this Court called for counsel who would both "prepare and present" the defenses (372 U.S. 335, 344), and in *Douglas v. California*, 372 U.S. 353, 358, the Court recognized "the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf" in connection with an appeal.

In determining what is necessary, the Courts have required "study or preparation for useful participation in the trial" (*Turner v. Maryland*, 4th Cir., 1962, 303 F.2d 507, 511) by "counsel reasonably likely to render *and rendering* reasonably effective assistance" (*MacKenna v. Ellis*, 5 Cir., 1960, 280 F.2d 592, 599, emphasis by the Court).

B.

When Petitioner Was Not Represented by Appointed Counsel, He Was Represented by Disqualified Counsel

Footnote 3 to the Brief in Opposition (Br. 4) does not fully explain the circumstances under which Petitioner was represented by the various attorneys who appeared on his behalf.

The "third lawyer" did not "*enter*" the case during the hearing on the motion for new trial. He then asked "permission of the Court to *re-enter* this case" (R. 619; emphasis added) and did represent Petitioner on appeal to the Fifth Circuit (see 340 F.2d at 49). The "third lawyer" was actually the first lawyer in the case, representing both Petitioner and his son (R. 2-3) until the son pleaded guilty (R. 15). Later, because the son was subpoenaed "as a witness on behalf of the Government" (R. 22, see R. 393),

the "third lawyer" requested permission to withdraw as attorney for Petitioner because of a conflict of interest which was specifically acknowledged by the prosecution (R. 22). Calling the "third lawyer" as a defense witness, appointed counsel announced in the presence of the jury that he wanted "to show whatever bias or prejudice he has against my client" (R. 400).

To suggest that continued participation in these proceedings by the "third lawyer" vitiates appointed counsel's lack of diligence is to ignore the fact that a lawyer cannot represent conflicting interests (*Glasser v. United States*, 315 U.S. 60, 70), whether the attorney is chosen by the client or court-appointed (*Porter v. United States*, 5 Cir., 1962, 298 F.2d 461, 462).

Indeed, both the government and the Court of Appeals below have recently accepted the duty of determining for themselves whether a lawyer may represent more than one client whether or not the clients consent. (*Randazzo v. United States*, 5 Cir., 1964, 339 F.2d 79, 80-81). It thus appears that appropriate disposition of this case might be remand to the Court of Appeals so that a lawyer unfettered by conflicting responsibilities may seek a determination that appointed counsel in the trial court did not meet minimum standard of diligence.

Conclusion

For the reasons stated, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case, or the case should be remanded to the Fifth Circuit with instructions to determine whether the attorney who represented Petitioner